Supreme Court of the United States

OCTOBER TERM, 1949

No. 403

RUDOLF REIDER,

Petitioner,

versus

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor,

Respondent.

BRIEF IN BEHALF OF RESPONDENT

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I.

OFFICIAL REPORT OF OPINIONS BELOW

The majority, concurring and dissenting opinions of the judges of the Court of Appeals for the Fifth Circuit were filed July 20, 1949 (Tr. p. 13 et seq.), and are reported at 176 Fed. 2d 13, et seq. Rehearing was denied on August 22, 1949 without opinion (Tr. p. 23). No opinion was rendered by the district judge other than a citation of cases in support of his order (Tr. pp. 9-10).

II.

BASIS OF JURISDICTION

Jurisdiction of this Court was invoked by petition for certiorari under Section 1254 of Title 28 of the United States Code. Certiorari was granted on December 5, 1949.

III.

STATEMENT OF THE CASE

Rudolf Reider brought this action against Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, under the Carmack Amendment * to the Interstate Commerce Act, for damage to a shipment of twenty-one cases and twelve barrels of skins and wool.[1]

The bill of lading issued by the respondent,[2] annexed to and made part of the complaint, showed that the shipment was received at New Orleans, Louisiana, August 10, 1944, from H. P. Lambert Co., Inc. from the steamship Rio Parana and was consigned in bond to the Collector of Customs at Boston, Massachusetts for the shipper. By stipulation between counsel,[3] ocean Bill of Lading No. 42 covering the shipment of 16 cases of sheepskins from Buenos Aires, Argentina, to New Orleans, by the steamship Rio Parana, was made part of the record.[4] It appeared thereby, that the goods were shipped by Emilio

* The Carmack Amendment as amended and presently in force is quoted in full in the Appendix, pp. 29-32.

[1] Tr. pp. 2, 3.
[2] Tr. pp. 4, 5.
[3] Tr. pp. 6, 7.
[4] Tr. pp. 7-9.

Rosler, S. R. L. on the ship Rio Parana, to the order of The First National Bank of Boston, notify Rudolf Reider, 39 Third Street, Boston, Massachusetts, U. S. A. The port of shipment was Buenos Aires and the port of discharge of the ship, New Orleans. It was further stipulated between counsel[5] that the remaining cases and barrels of skins and wool involved in this suit were shipped from Buenos Aires, Argentina, to New Orleans, aboard the steamship Rio Parana, under ocean bills of lading containing the same provisions, terms and conditions as Bill of Lading No. 42.

The complaint alleged[6] that on arrival at destination the shipment was found to be damaged by water and stained and moldy. Recovery was sought for the amount of $2,000.00.

Respondent moved to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted.[7] The basis of the motion was that the shipment was not one covered by the Carmack Amendment as the shipment originated in a non-adjacent foreign country, and moved to its ultimate destination pursuant to the persisting intention of its owner. Judge Borah, the District Judge (recently made a member of the Court of Appeals for the Fifth Circuit), sustained the motion and dismissed the action.[8] On appeal to the Court of Appeals for the Fifth Circuit, the dismissal of the action was affirmed.[9]

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[5] Tr. pp. 6, 7.
[6] Tr. pp. 2, 3.
[7] Tr. p. 5.
[8] Tr. pp. 9, 10.
[9] Tr. p. 21.

IV.

ARGUMENT

A.

The issuance of a bill of lading by a domestic rail carrier does not affect the continuity of a shipment that originated in a foreign country and no claim thereon may be made under the Carmack Amendment.

This action was brought under the Carmack Amendment. It will only lie if that Act is applicable, as there is no allegation that the damage occurred on respondent's line, nor is the necessary jurisdictional amount claimed. We contend that recovery cannot be had under the Carmack Amendment because the record affirmatively shows that there was but one continuous through shipment from its inception in a non-adjacent foreign country to its ultimate destination at Boston, and that such shipments are not covered by the express provisions of the Act.

It is well settled [1] and petitioner concedes,[2] that the Carmack Amendment does not cover transportation from a non-adjacent foreign country. Petitioner contends, however, that the rail carriage in the instant case should be disassociated from the ocean shipment. An analysis discloses that the only possible bases for this contention, are:

(a) That petitioner here did not intend that the shipment should move from Buenos Aires to Boston (or that his intention in this regard is unimportant);

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[1] Roberts, Federal Liabilities of Carriers, 2nd Ed., Vol. 1, Sec. 393.
[2] Petitioner's brief p. 7.

(b) That the physical unloading from the ship and loading into the freight cars would break the continuity of the shipment; or

(c) That the issuance of the bill of lading by respondent here would have that effect.

However, each of these problems has been considered heretofore by your Honors and decided favorably to respondent.

In *Baltimore & Ohio Southwestern Railroad Company v. W. H. Settle, et al.*,[3] the question of the intention of the shipper arose in considering a shipment of lumber from outside Ohio, to a point in Ohio, which was shipped a few days later to another point in Ohio on a new bill of lading. This Court held that the intention of the shipper as carried out, determined "as a matter of law" the essential character of the shipment, holding that the second movement was a part of a continuing interstate shipment.

In the case at bar, the intention of the shipper apparently never varied from the inception of the shipment at Buenos Aires on the ocean bill of lading,[4] from which it appeared that both the consignee and the owner, petitioner here, were in Boston. The stipulation [5] shows that the same goods were forwarded by rail "in bond" to the Collector of Customs at Boston. The bill of lading [6] issued by respondent stated that the shipment was from the same steamship "Rio Parana" named in the ocean bill. The

[3] 260 U. S. 166, 43 S. Ct. 28, 67 L. Ed. 189.
[4] Tr. pp. 7-9.
[5] Tr. pp. 6, 7.
[6] Tr. pp. 4, 5. See also Stipulation and Addition to Record.

complaint alleges[7] that petitioner (named in the ocean bill, as noted above) was the owner of the goods being carried.

Petitioner's intention that the carriage should continue all the way to Boston is evidenced by the bills of lading, the stipulation, the bill of complaint, by the actual movement to Boston, and by the fact that the shipment was not submitted to the customs officials in New Orleans, the port of entry.

In response, petitioner states that he might have decided to stop the shipment in New Orleans. This argument would seem to carry little weight, since the owner of a shipment always has the right of stoppage *in transitu* at any intermediate point through which goods might pass, even when transported on a single bill of lading.[8]

Had petitioner stopped his shipment in New Orleans, he might conceivably have argued that his intention was not to send it on to Boston. However, as the Court said in the *Settle* case "* * * the intention, as it was carried out, determined, as a matter of law, the essential nature of the movement * * *"

We respectfully submit that the essential nature of the movement in the instant case was a through shipment from a non-adjacent foreign country, since the ocean and rail portions are considered conjointly as a matter of law. We further submit that the Carmack Amendment which by its terms does not apply to shipments from non-

[7] Tr. pp. 2, 3.
[8] 9 Am. Jur. verbo Carriers §§530, 572.

adjacent foreign countries, is therefore not applicable to any single portion of the transportation here from Buenos Aires to Boston.

We then come to the question of whether the effect of physically unloading the shipment from the steamship and loading it into the cars for the rail transportation could result in there being two shipments instead of a single continuous one. *In Southern Pacific Terminal Company v. Interstate Commerce Commission,*[9] shipments from points in Texas and elsewhere to Galveston, Texas, were unloaded from the freight cars onto the wharves and were actually processed before being loaded into steamships for movement to foreign countries. This Court held that the entire shipment moved in foreign commerce, including the transportation within the State of Texas, for as was said in that opinion:

> ". . . *It makes no difference, therefore, that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston or some other place in Texas. They were all destined for export,* and by their delivery to the Galveston, Harrisburg & San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the terminal company being a part of the railway for such purpose." (Emphasis ours.)

If any further authority is necessary in support of this statement, see *Texas & New Orleans Railroad Company v. Sabine Tram Company;*[10] *Railroad Commission v. Texas & Pacific Railway Company;*[11] *Illinois Central Railroad*

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[9] 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310.
[10] 227 U. S. 111, 33 S. Ct. 229, 57 L. Ed. 442.
[11] 229 U. S. 336, 33 S. Ct. 837, 57 L. Ed. 1215.

Co. v. De Fuentes;[12] and *Railroad Commission of Ohio v. Worthington*.[13]

The only other possible contention, and apparently the one being urged most strongly by petitioner, is that the issuance of the bill of lading by respondent, would in itself, have the effect of dividing the movement into a rail shipment entirely distinct and separate from that by water, so that the shipper would have the right to invoke the provisions of the Carmack Amendment as to the second portion thereof. However, in *Western Oil Refining Company v. Lipscomb*,[14] this Court specifically held that it was not the question of whether a local or through bill of lading was involved, but the character of the shipment that was determinative.

It seems to be well settled that where a shipment was made in two stages, with separate bills of lading covering each segment of the movement, both are indivisible components of the whole. See the language quoted *supra*, from the *Southern Pacific Terminal* case, the holdings in the *Settle*, *Lipscomb* and *Sabine Tram Company* cases, *supra*, and *Baer Brothers Mercantile Co. v. Denver & R. G. R. Co.*;[15] *Swift & Company v. United States*;[16] and *Railroad Commission v. Texas & Pacific Railroad Company*.[17] The rule has been reiterated so frequently, that the opinion of the Court in the *Lipscomb* case stated:

> *"As this court often has said, it is the essential character of the commerce, not the accident of local*

[12] 236 U. S. 157, 35 S. Ct. 275, 59 L. Ed. 517.
[13] 225 U. S. 101, 32 S. Ct. 653, 56 L. Ed. 1004.
[14] 244 U. S. 346, 37 S. Ct. 623, 61 L. Ed. 1181.
[15] 233 U. S. 479, 34 S. Ct. 641, 58 L. Ed. 1055.
[16] 196 U. S. 375, 25 S. Ct. 276, 49 L. Ed. 518.
[17] Supra, n. 11.

or through bills of lading, that is decisive. Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. Ed. 310, 31 Sup. Ct. Rep. 279; Railroad Commission v. Worthington, 225 U. S. 101, 56 L. Ed. 1004, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 57 L. Ed. 442, 33 Sup. Ct. Rep. 229; Railroad Commission v. Texas & P. R. Co., 229 U. S. 336, 57 L. Ed. 1215, 33 Sup. Ct. Rep. 837; Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 343, 58 L. Ed. 988, 992, 34 Sup. Ct. Rep. 592; South Covington & C. Street R. Co. v. Covington, 235 U. S. 537, 545, 59 L. Ed. 350, 353, L. R. A. 1915F, 792, P. U. R. 1915A, 231, 35 Sup. Ct. Rep. 158." (Emphasis ours.)

In the *Settle* case where two bills of lading had issued, it was said that "through billing" is immaterial. In the *Lipscomb* case, that it is the character of the commerce and not whether it was "local or through bills of lading" that determined the question, and in the *Southern Pacific Terminal* case, that it made "no difference therefore that the shipments of the products were not made on through bills of lading."

Consequently, we find this rule followed consistently whether the question was one of the imposition of taxes upon the commerce, of the rates to be applied, or of regulations by local bodies. Furthermore, in the case of *United States of America v. Erie Railroad Company*,[18] this Court considered a shipment moving in import from a foreign country, and thence transshipped on new bills of lading to an inland point by rail. Factually, the situation is much akin to that in the instant case.

[18] 280 U. S. 98, 50 S. Ct. 51, 74 L. Ed. 187.

In a well-reasoned opinion in the *Erie* case, Mr. Justice Brandeis said:

> "*But the nature of the shipment is not dependent upon the question when or to whom the title passes.* Pennsylvania R. Co. v. Clark Bros. Coal Min. Co., 238 U. S. 456, 465, 466, 59 L. ed. 1406, 1410, 1411, 35 Sup. Ct. Rep. 896. *It is determined by the essential character of the commerce.* Baltimore & O. S. W. R. Co. v. Settle, 260 U. S. 166, 170, 67 L. ed. 189, 192, 43 Sup. Ct. Rep. 28. *It is not affected by the fact that the transaction is initiated or completed under a local bill of lading which is wholly intrastate* (Railroad Commission v. Worthington, 225 U. S. 101, 108-110, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 57 L. ed. 442, 33 Sup. Ct. Rep. 229; Hughes Bros. Timber Co. v. Minnesota, 272 U. S. 469, 71 L. ed. 359, 47 Sup. Ct. Rep. 170), *or by the fact that there may be a detention before or after the shipment on the local bill of lading* (Carson Petroleum Co. v. Vial, 279 U. S. 95, 73 L. ed. 626, 49 Sup. Ct. Rep. 292). *The findings of the Commission, that the broker acts only as agent and that from the time that the pulp is put aboard the steamer there is a continuing intent that it should be transported to Garfield, ought to have been accepted by the District Court as conclusive, since there was ample evidence to sustain it.* Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268, 70 L. ed. 941, 46 Sup. Ct. Rep. 500; Virginian R. Co. v. United States, 272 U. S. 658, 71 L. ed. 463, 47 Sup. Ct. Rep. 222. *The rail transportation is in fact a part of foreign commerce.*" (Emphasis ours.)

Petitioner attempts to brush aside the *Erie* and *Sabine Tram Company* cases, and presumably the cases cited above, by contending that they relate only to Section 1 of the Interstate Commerce Act, and not to the Carmack Amendment. Such a contention not only does violence to the well-recognized rules of statutory interpretation, but also disregards the plain unambiguous language used in the cited cases.

Petitioner does not explain how he hopes to avoid the effect of the last sentence quoted above from the *Erie* case. For if the rail transportation in that case, the facts of which are closely analogous to those here, "is in fact a part of foreign commerce", then the rail transportation in the instant case is but a continuation of the ocean carriage and respondent is not an initial carrier. Despite the breaks in the continuity of shipments, the existence of separate bills of lading, the lapse of time at the points of transshipment (some even being for a sufficient time to actually process goods), the decision in each case has been based upon the essential character of the shipment.

If there is but one shipment for the purpose of determining what regulations shall apply, as said in *Railroad Commission v. Texas & Pacific Railroad Company, supra*, it would seem to follow that in the instant case there is but one shipment insofar as the applicability of the Carmack Amendment is concerned. And if there is a break between the rail and ocean carriage in the continuity of the shipment, sufficient to permit processing of the goods, as there was in *Southern Pacific Terminal Company v. Interstate Commerce Commission, supra*, and the shipment

was held to be but one movement, so that the commission could order the elimination of unfair preferences, we respectfully submit that in the instant case, with hardly an interruption, the same rule should apply .

Furthermore, if in the *Erie* case, a rail movement entirely within the State of New Jersey, on one bill of lading, after an ocean voyage on a separate bill of lading, is a single shipment, then it seems logical, that in construing the Carmack Amendment's applicability to the case at bar, the same rule should be invoked.

These analogies run on and on. Without reiterating the facts in each, we refer your Honors to the *Worthington, Sabine Tram,* and *Settle* cases, *supra,* as well as *Oregon-Washington R. & Nav. Co. v. Strauss & Co., Inc.;*[19] *Texas & P. Ry. Co. v. Langbehn;*[20] *Houston Direct Nav. Co. v. Insurance Co. of North America;*[21] *Anderson, Clayton & Co. v. Wichita Valley Ry. Co.;*[22] and *McFadden, et al. v. Alabama Great Southern R. Co.*[23]

We, therefore, respectfully submit that the continuity of the instant shipment, appearing as it does from the record in this case, governs its character, and that under the authorities cited above, the bill of lading issued by respondent was simply supplemental to the ocean bill, and neither interrupted nor affected the continuity or the foreign character of the shipment so as to make the

[19] 73 F. 2d 912, cert. den. 274 U. S. 723, 55 S. Ct. 551, 79 L. Ed. 1255.
[20] 158 S. W. 244.
[21] 32 S. W. 889.
[22] 15 F. Supp. 475, 92 F2d 104, cert. den. 302 U. S. 747, 58 S. Ct. 265, 82 L. Ed. 578.
[23] 241 Fed. 562.

Carmack Amendment apply to that segment of the shipment that began on respondent's lines.

POINT B.

The Carmack Amendment does not permit an action against a carrier issuing a second bill of lading covering the second portion of a continuous shipment, merely because of the issuance of such bill of lading.

In support of its holding on this point, the Court of Appeals relied in part upon the cases of *Mexican Light & Power Co. v. Texas-Mexican Railway Co.*;[24] *Missouri Pacific Railroad Company v. Porter*;[25] and *A. Russo & Co. v. United States*.[26] Petitioner contends that the *Texas-Mexican* case has no bearing upon the point at issue, except in one minor particular. He thereby adopts the position of the dissenting judge of the Court of Appeals, who said that the case "rules nothing as to a reverse shipment originating in Mexico or any other foreign country for which Texas-Mexican Ry. Co. might at Laredo give its bill of lading for transportation to a point in Pennsylvania."

It is true, of course, that this case is not direct authority in support of respondent's position, for the reason that the movement in question was not from a non-adjacent foreign country, but was to an adjacent foreign country, where under certain circumstances, the Carmack Amendment might be applicable. However, it cannot be dismissed

[24] 331 U. S. 731, 67 S. Ct. 1440, 91 L. Ed. 1779.
[25] 273 U. S. 341, 47 S. Ct. 383, 71 L. Ed. 672.
[26] 40 F. 2d 39.

from consideration here, as petitioner attempts, for it directly holds that the Texas Supreme Court properly found that the bill of lading issued by the Texas-Mexican "did not evidence any new and independent undertaking, when judged by the rigid requirements by which bills of lading are valid under the Carmack Amendment."

As in the *Texas-Mexican* case, there is no evidence in the record here that any consideration was paid to respondent for the issuance of its bill of lading. More important from respondent's standpoint is the holding that the Pennsylvania Railroad was not displaced as the initial carrier by the issuance of the new bill of lading by the Texas-Mexican.

Judge McCord cited *Missouri Pacific Railroad Company v. Porter*,[27] *A. Russo & Co. v. United States*,[28] and other cases supporting his holding[29] that there "is persuasive authority from both Federal and State courts to the effect that shipments to and from non-adjacent foreign countries were not intended to be governed by the Carmack Amendment, and that actions to enforce liability against a domestic carrier for such foreign shipments could not be brought thereunder."

Petitioner professes to see no connection between these cases and the instant one, saying that they relate to shipments moving out of the United States under through shipments. Such an approach, however, sidesteps rather than answers the question. It is hardly to be contended

[27] Supra, n. 25.
[28] Supra, n. 26.
[29] Tr. p. 15.

that the rule depends upon the direction of the movement. In *Galveston H. & S. R. Co. v. Woodbury*,[30] Mr. Justice Brandeis in referring to the Carmack Amendment, said: "The test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's ope ation."

Moreover, in the *Russo* case, the shipment actually moved in import by ocean carrier and thence by rail. Consequently, there was an import rather than an export movement.

The only remaining point of difference, which petitioner claims to exist between the case at bar and the *Porter* case, is that in the latter, there was a through bill of lading. An analysis of the facts discloses that in this, he is not correct. In the *Porter* case, the shipper delivered to the rail carrier at Earle, Arkansas, 75 bales of cotton to be shipped to Liverpool. Mr. Justice Butler said that the "carrier issued to the shippers an export bill of lading in two parts; the first covered the inland haul from Earle to Brunswick, Georgia, designated as port A, and the second covered the ocean carriage from Brunswick to Liverpool designated as port B." It was held that the Carmack Amendment did not apply, since shipments moving to non-adjacent foreign countries partly by rail and partly by water are not within the scope of the act.

We refer your Honors to the transcript in the *Porter* case, wherein the bill of lading under consideration there, is set forth.[31] It will be noted that the bill was in the form approved by the Interstate Commerce Commission.[32]

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[30] 254 U. S. 357, 41 S. Ct. 114, 65 L. Ed. 301.
[31] Transcript in the Porter case, pp. 9, 10.
[32] Appendix D, 64 I. C. C. 347, 355.

That bill of lading has been modified slightly in subsequent opinions,[33] but not in any particular, important here. As your Honors will note, the bill of lading under consideration in the *Porter* case, was one executed "on behalf of carriers severally and not jointly", the first part of the bill applying solely to the rail transportation within the United States, and the second part applying solely to the ocean transportation. The obligation of the rail carrier was, therefore, no greater than if a purely inland bill of lading had been used with a notation "For Export". In such a case, the rail carrier is liable for no obligation whatever for any loss or damage occurring after delivery at shipside.[34]

Such being the case, it necessarily follows that the bill of lading issued by respondent, in the case at bar, showing that the shipment moved in import from an ocean voyage is subject to the same construction, and by the same token, any claim made thereon, is likewise not subject to the effect of the Carmack Amendment. The *Porter* case, is therefore, we respectfully submit, clear, definite authority supporting respondent's position.

There are, moreover, quite a number of cases decided by the courts of last resort in several states, in each of which the facts were more nearly similar to the facts of the case at bar than they were even in the *Porter* case. Illustrative of such decisions are the four that we shall now discuss.

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[33] 66 I. C. C. 687; 80 I. C. C. 305; 156 I. C. C. 188; 235 I. C. C. 63.
[34] New York Produce Exchange v. B. & O. R. R. Co., 46 I. C. C. 666, 670.

In *Fahey et al. v. Baltimore & Ohio Railroad Company* [35] the Carmack Amendment was invoked to recover from a carrier issuing a bill of lading for grain to be shipped from inland points to Baltimore destined for export. In holding that the Carmack Amendment was not applicable because the shipment was moving in foreign commerce, the Maryland Supreme Court said:

> "The Supreme Court of the United States, in a series of decisions, has settled the principle by which a question like the present one should be controlled. The intention as to destination with which the goods are delivered and accepted for conveyance by the carrier is held to be the determining factor in such a problem. Whether or not in a particular case the bill of lading discloses that the shipment is for export, if that was the real design with which it was started on the course of its transportation, and if it would proceed to a foreign destination as the normal result of the movement thus originated, it must be regarded and classified as foreign commerce for the purposes of such an inquiry as the one with which we are now concerned."

Although the rail bill of lading merely recited that the shipment was for export and separate ocean bills were executed to cover the portion of the carriage by water, the Court, after citing and discussing the decisions of this Court noted above, held the Carmack Amendment inapplicable, saying:

> "The facts of the case, in our judgment, bring it clearly within the principle of the decisions of the Supreme Court to which we first referred, and we,

[35] 139 Md. 161, 114 A. 905.

therefore, hold that the shipments of grain, for the loss of which additional compensation is sought to be recovered in this suit, were in course of transportation to a non-adjacent foreign country, at the time of their destruction, and that the measure of damages stipulated in the bills of lading is not contrary to the provisions of the Federal statutes but is a valid limitation of the carrier's liability for such a loss."

In *Barber v. Missouri Pacific R. Company*[36] the question before the Kansas Supreme Court was whether a rail shipment of two cars of wheat moving under a bill of lading from Kansas to Galveston, and which bill of lading stated that the wheat was to be exported, was subject to the Carmack Amendment. It appeared that no bill of lading had been issued to cover the ocean carriage, yet the Court held that the Carmack Amendment was not applicable, considering that the rail portion of the shipment was but an incident in the entire continuous transportation contemplated to the foreign country.

In *Lesser-Goldman Cotton Co. v. Missouri Pacific R. Company*,[37] the Supreme Court of Missouri had a similar question and reached a similar result. One Wier issued a bill of lading as agent of the Missouri Pacific for a shipment of cotton from Pine Bluff, Arkansas to New Orleans and at the same time, Wier as agent for a steamship line, issued a bill of lading for the carriage of the cotton from New Orleans to Liverpool. Despite the fact that the cotton was destroyed while in the possession of the Missouri Pacific the Court held that the Carmack Amendment did

[36] 118 Kans. 651, 236 P. 859.
[37] 321 Mo. 714, 12 S. W. 2d 485.

not apply, following the decision in the case of *Missouri Pacific R. Company v. Porter, supra,* since the shipment was to be considered as a whole, and was destined for foreign shipment. This Court then declined to issue a writ of certiorari in this case.[38]

Following the three cases just above mentioned, the Supreme Court of Illinois was called upon to consider the case of *Lino et al. v. The Northwestern Pac. R. R. Co.*[39] There an initial rail carrier had moved the freight under its bill of lading and delivered it to the defendant carrier. The defendant carrier thereafter issued its own bill of lading to the ultimate destination. The first bill of lading disclosed on its face that there was to be a subsequent movement of the freight, but only contracted for the carriage to the point where delivery was made to the defendant, the second carrier, to which the car was transferred intact. After citing the *Sabine Tram Company* and *Settle* cases, *supra,* the Court held that the first carrier was the initial carrier and that, even though the defendant had issued a new bill of lading, action could not be brought against it under the Carmack Amendment.

There were similar holdings in the case of *Houston East & West Texas Ry. Co. v. Inman, Akers & Inman,*[40] and in *Chicago M. & St. P. R. R. v. Jewett.*[41] To the same effect, although the Carmack Amendment was not specifically at issue, was the decision of this Court in *Atchison, Topeka & S. F. R. Co. v. Harold,*[42] as well as *McFadden, et al. v.*

[38] 279 U. S. 855, 49 S. Ct. 351, 73 L. Ed. 997.
[39] 332 Ill. 93, 163 N. E. 316.
[40] 63 Tex. Civ. App. 556, 134 S. W. 275.
[41] 169 Wis. 102, 171 N. W. 757.
[42] 241 U. S. 371, 368 S. Ct. 665, 60 L. Ed. 1050.

Alabama Great Southern R. Co.,[43] *State of Texas v. Anderson Clayton & Co., et al.*,[44] and *Texas & P. Ry. Co. v. Langbehn.*[45]

The case at bar is, therefore, not *res nova*, as petitioner seeks to imply. While he makes no direct statement that it is, he cites as his only affirmative authority three cases that we submit are not at all applicable, namely, *Rice v. Oregon Short Line R. Co.*,[46] *Barrett v. Northern Pac. Ry.*,[47] both from Idaho, and *Baltimore & O. R. Co. v. Montgomery & Co.*[48] The distinction between those cases and the instant case is that in none of the former was there ever an intention, at the inception of the shipment, to transport it to its ultimate destination.

In the *Rice* and *Barrett* cases, the prior bill of lading only called for a shipment to the point from which it was subsequently rerouted. In the other, the *Baltimore and Ohio* case, the shipment moved to its original destination on one bill of lading, whence it was diverted. The original bill of lading, after the completion of the shipment, was altered to show the new destination and thereafter the shipment moved thereon.

We, therefore, respectfully submit that the facts in the cases cited by the peittioner are not apposite to the case at bar, while the *Porter* case, decided by this Court, is affirmative authority for respondent's position. More-

[43] Supra, n. 23.
[44] 92 F. 2d 104, cert. den. 302 U. S. 747, 58 S. Ct. 265, 82 L. Ed. 578.
[45] Supra, n. 20.
[46] 33 Idaho 565, 198 Pac. 161.
[47] 29 Idaho 139, 157 Pac. 1016.
[48] 19 Ga. App. 29, 90 S. E. 740.

over, the *Fahey, Barber, Lesser-Goldman, Lino* and other cases cited above by respondent are persuasive authority, not only because of the similarity of their facts to the instant case, but also because they have not provoked any amendment to the Act, indicating an apparent satisfaction with the provisions of the Act as it is and has remained for many years.

The Second Circuit Court of Appeals said in *Cudahy Packing Co. v. Munson S. S. Line*[49] quoting in part from a decision by this Honorable Court:

> "Amendment after amendment has been made to the Interstate Commerce Act in its long history. Again and again Congress has extended its scope under the broad power to regulate interstate and foreign commerce. In such circumstances there is the strongest ground to believe that what Congress 'passed * * * by * * * it was satisfied to leave * * * to the Interstate Commerce Commission and the common law.' Gooch v. Oregon Short Line R. R. Co., supra, at page 25 (42 S. Ct. 193)."

And as the Texas Court of Civil Appeals said in *Houston East & West Texas Ry. Co. v. Inman, et al.*,[50] the rule making an initial carrier responsible: "* * * is an arbitrary one, and can only be upheld upon the grounds of public necessity, and it is entirely reasonable to conclude that Congress did not deem it wise to extend this rule so as to make the domestic carrier liable for loss occasioned by the negligence of a foreign steamship company or other foreign carrier, because the right of the domestic carrier

[49] 22 F. 2d 878, cert. den. 277 U. S. 586, 48 S. Ct. 433, 72 L. Ed. 1000.
[50] Supra, n. 40.

to be reimbursed for any amount paid by it by reason of the default of a connecting carrier would be much more difficult of enforcement against a foreign carrier than it would if the shipment was merely interstate."

As suggested in *Southern P. R. Co. v. Gonzalez*,[51] "the Interstate Commerce Act could have provided that in case a shipment originated in a foreign country, the first carrier within the United States should be considered as the initial carrier, and have imposed upon it the liability set forth in the Carmack Amendment, . . ." That it does not so provide, is, we respectfully submit, ample evidence that Congress did not intend that it should.

The Court of Appeals quoted in its majority opinion from *Alwine v. Pennsylvania R. Co.*[52] to the effect that since the Carmack Amendment is a radical departure from the common law, its effect should not be extended beyond its plain meaning and its evident purpose. In the *Alwine* case, the Court also said:

> ". . . *it is only fair to assume that Congress would have extended the act so as to cover imports from foreign adjacent countries had they deemed that the public interest required it and it was proper so to do.*" (Italics ours.)
>
> * * * * *
>
> "It cannot be contended that the Carmack Amendment took effect at the boundary between the United States and adjacent foreign territory *for the amendment covers the entire movement.* . . ." (Emphasis ours.)

[51] 48 Ariz. 260, 61 P. 2d 377.
[52] 141 Pa. S. 558, 15 A. 2d 507.

A comparison of the provisions of the first Cummins Amendment with Section 1 of the Act discloses that the language in the former making it applicable to no foreign shipments other than those moving TO adjacent foreign countries, is found in Section 1 of the Act [53] as it read when the first Cummins Amendment [54] was adopted. Research discloses no discussion, either in Congress or its Committees, relating to the reasons for such limitation. Yet when the history of the Carmack and Cummins Amendments is considered, the entire perspective becomes clear.

Judge Hutcheson, in his concurring opinion,[55] considered the historical aspect of the statutes and their proper interpretation. Petitioner refers to the slight misgivings mentioned by Judge Hutcheson, in his opinion, leaving the impression that there was a note of indecision remaining in the judge's mind. That such is not the case is self-evident from the statement thereafter that the slight misgivings "entirely disappear when consideration is given to the history of the section and the uniform course of decision as to its non-applicability to shipments originating in foreign countries * * *." As stated, the only doubt arose not "from the over-all picture of the case", but from the "artful" use by the dissenting judge of a few words from the statute "construed, as he wants them to be, by themselves apart from their context in the section as a whole, as amended, and without regard to its long and informative judicial and legislative history."

[53] Appendix, pp. 33, 34.
[54] Appendix, pp. 35, 36.
[55] Tr. pp. 16, 17.

It is not strange that petitioner utilizes the ingenious device of seizing upon a few words as the foundation of his argument for which he cites no other supporting authority.

We respectfully submit, however, that Judge Hutcheson is correct and that a statute should not be interpreted by reference to a few selected words, without regard to the whole and particularly not when it has been subjected to interpretation and amendment over a long period of time. The Interstate Commerce Act has been law in this country for over sixty years, the Carmack Amendment for over forty. The several amendments to the latter have been passed to eliminate points of weakness. And, we respectfully submit, if Congress had intended that the act should apply to a shipment such as in the case at bar, it would have said so.

POINT C.

Even if it were possible for an action to be maintained under the Carmack Amendment by a shipper who obtains a bill of lading from a carrier, covering the second portion of a through shipment, petitioner has placed himself in a position where he is unable to do so.

We submit that we have adequately shown that the Carmack Amendment is not applicable to a shipment moving as did the one in the instant case. We further contend that petitioner can not recover in the case at bar in any event.

Petitioner alleged that when the shipment was delivered to respondent, it was "in good condition." On the other hand, he made part of his complaint,[56] documents [57] which not only cast doubt upon the correctness of this allegation, but affirmatively show he did not know the condition of the shipment.

The bill of lading [58] issued by respondent shows that the condition of the contents of the packages delivered to it were unknown. The description of the shipment in the complaint [59] and the rail bill of lading [60] shows that the entire shipment was in containers. The ocean bill of lading [61] and the stipulation [62] evidences that the same merchandise that moved from Buenos Aires was delivered to respondent. Consequently, petitioner affirmatively shows in the record that he did not know the condition of the goods at the time they were delivered to respondent.

As Judge McCord said in his majority opinion,[63] the Carmack Amendment "was not intended to apply where as here, a shipper brings an action not against the initial foreign carrier but against an intervening domestic carrier and attempts to hold that carrier responsible for damage that may have been caused by the foreign carrier." And as he further said: "In such instance if the intervening carrier were held liable, he might have no enforceable cause of action for recovery of his damages against the foreign carrier if the latter were actually responsible."

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[56] Tr. pp. 2, 3.
[57] Tr. pp. 4-9.
[58] Tr. pp. 4, 5.
[59] Tr. pp. 2, 3.
[60] Tr. pp. 4, 5.
[61] Tr. pp. 7-9.
[62] Tr. pp. 6, 7.
[63] Tr. pp. 13-17.

Obviously, it would be well nigh impossible for respondent here to recover against the Argentine government, owners of the Steamship "Rio Parana", for the damage which may well have occurred thereon.

That such damage may have so occurred is evidenced by the facts in the case of *Clark v. Barnwell, (In re Barque Susan W. Lind)*,[64] where the ship owners were held not responsible for water damage and mold occurring on the interior of packages or boxes of cotton thread as a result of the dampness in the ship's hold. See also *Mendelsohn v. The Louisiana*,[65] *Ireguist v. Morewood*,[66] and *McCullough v. The Echo*,[67] all holding the ship not liable for the deterioration of the cargo caused by sweating in the hold. See also *The Ship Star of Hope v. Andrew S. Church et al.*[68]

We do not believe that it was the intention of Congress that any such burden should be placed upon a domestic rail carrier. This is particularly true where the first leg of the journey is by water carrier, not subjected to the same degree of liability as are common carriers by rail.

Congress apparently intended that the Act should only apply to those shipments as to which a carrier could recover from all other carriers participating in the through transportation of the goods. This becomes clear when we see that a specific provision to this effect is now in the Act[69] and has been part of it since the adoption of the Carmack Amendment in 1906.[70]

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[64] 53 U. S. 272, 12 How. 272, 13 L. Ed. 985.
[65] 3 Woods. 47, F. C. 9,461.
[66] 13 Fed. Cas. 89, F. C. 7,061, aff. 23 How. (64 U. S.) 491, 16 L. Ed. 516.
[67] 16 Fed. Cas. 11, F. C. 8,740a.
[68] 17 Wall. (U. S.) 651, 21 L. Ed. 719.
[69] Appendix, p. 32.
[70] Appendix, pp. 84, 85.

We respectfully submit that, irrespective of any right that might be urged by any other shipper who may take the precaution to break the continuity of a combination foreign and domestic shipment and definitely determine and then allege that there had been no damage before delivery to the rail carrier, petitioner may not recover under the state of the record in this case.

V.

CONCLUSION

We, therefore, respectfully submit that the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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January .., 1950.

This is to certify that copies of this brief have been served on opposing counsel on January ...., 1950.

.....

APPENDIX

The Carmack and Cummins Amendments to the Interstate Commerce Act as subsequently amended and presently in force. 49 U. S. C. 20(11) and (12).

"(11) Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transporation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party

entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water; Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent up-

on the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this chapter; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary livestock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action, which he has under the existing law; Provided further, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad; Provided further, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has

disallowed the claim or any part or parts thereof specified in the notice: And provided further, That for the purposes of this paragraph and of paragraph (12) the delivering carrier shall be construed to be the carrier performing the linehaul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: And provided further, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided." June 29, 1906, c. 3591, 34 Stat. 593; March 4, 1915, c. 176, 38 Stat. 1196; August 9, 1916, c. 301, 30 Stat. 441; February 28, 1920, c. 91, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; March 4, 1927, c. 510, 44 Stat. 1448; April 23, 1930, c. 208, 46 Stat. 251; September 18, 1940, c. 722, 54 Stat. 916.

"(12) The common carrier, railroad, or transportation company issuing such receipt or bill of lading, or delivering such property so received and transported, shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it in defending any action at law brought by the owners of such property." June 29, 1906, c. 3591, 34 Stat. 593; March 4, 1915, c. 176, 38 Stat. 1196; August 9, 1916, c. 301, 30 Stat. 441; February 28, 1920, c. 91, 41 Stat. 494; July 3, 1926, c. 761, 44 Stat. 835; March 4, 1927, c. 510, 44 Stat. 1448; April 23, 1930, c. 208, 46 Stat. 251; September 18, 1940, c. 722, 54 Stat. 916; June 3, 1948, c. 386, 62 Stat. 295.

Section 1 of Interstate Commerce Act as written and in force when the first and second Cummins Amendments were enacted.

"That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transhipment, or shipped from a foreign country to any place in the United States and carried to such place

from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid." February 4, 1887, c. 104, 24 Stat. 398; June 29, 1906, c. 3591, 34 Stat. 584; June 18, 1910, c. 309, 36 Stat. 544.

Carmack Amendment as it was adopted.

"That any common carrier, railroad, or transportation company receiving property for transportation, from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line

the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof." June 29, 1906, c. 3591, 34 Stat. 593.

First Cummins Amendment as it was adopted.

"Any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, the District of a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company, so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for trans-

portation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property. . . ." March 4, 1915, c. 176, 38 Stat. 1196.

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 403

403

RUDOLF REIDER,

Petitioner,

versus

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor,

Respondent.

PETITION FOR REHEARING ON BEHALF OF RESPONDENT.

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Respondent.

PETITION FOR REHEARING ON BEHALF OF RESPONDENT.

Respondent, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, respectfully petitions this court for a rehearing in this matter, because of several grievous errors that have been made in the majority opinion.

1. The Continuity of the Shipment.

This Court said in the majority opinion that whether the commerce is properly characterized as foreign or domestic is not material, and that, therefore, reliance upon the cases of *United States v. Erie Railroad Company*, 288 U. S. 98,

and *Texas and New Orleans R. Co. v. Sabine Tram Company*, 227 U. S. 111, and the long list of supporting authorities is misplaced. That statement completely disregards the decisions of this Court interpreting the very act of which the Carmack Amendment forms a part. All of the prior decisions of this Court have held that the continuity of the shipment is the decisive test of its character. To say that it is immaterial whether the commerce is foreign or domestic does violence to the express provisions of the Carmack Amendment, which negatives its applicability to shipments moving from non-adjacent foreign countries. The Amendment obviously cannot take effect at the border with respect to any import, and this Court by its other language in the majority opinion acknowledges that it cannot take effect in the middle of a shipment. Yet the holding of the majority opinion can only be justified if this Court is willing to overrule the doctrine clearly and frequently enunciated in the *Erie*, *Sabine Tram*, *supra*, and the other cases cited in our original brief, that a shipment such as the one in the instant case moved continuously in foreign commerce.

To say, as this Court does, that "Respondent was the receiving carrier squarely within the wording and meaning of the Carmack Amendment" is simply begging the question. As Judge Hutcheson and Mr. Justice Frankfurter recognized, "the answer to our problem is not to be had by taking words of the Carmack Amendment out of the illuminating context of the regulatory schemes of which they are a part."

We respectfully submit that the present shipment, which, by the standard enunciated by this Court, does constitute foreign inbound commerce, was specifically excluded by Congress from those covered by the Carmack Amendment.

2. The Applicability of the Porter case.

We submit that the majority opinion in this case cannot be harmonized with the decision of this Court in *Missouri Pacific R. Co. v. Porter*, 273 U. S. 341. Furthermore, we submit that the distinction announced in the majority opinion between the *Porter* case and the instant one is purely superficial.

The discussion of the Carmack and Cummins Amendments occupies a substantial (rather than a brief) portion of the opinion in that case. Moreover, if that opinion is read in any other than a cursory fashion, the reader can only reach the conclusion that this Court affirmatively held in the *Porter* case that the Carmack Amendment was not applicable to that shipment. We submit that this Court did so hold, and the only basis for its holding was that the Act did not apply to a shipment moving on separate bills of lading by rail and thence by ocean carriage.

As we pointed out in our original brief, the transcript in the *Porter* case shows that the terms of the bills of lading in that case were almost identical to those here. And the effect of the *Porter* case is even more decisive when

we appreciate that the actual damage that occurred to the shipment in that case admittedly occurred while it was in the possession of the rail carrier. Yet even then, this Court refused to permit an action to be brought against the rail carrier because the Carmack Amendment was not applicable to such shipment in foreign commerce.

As Mr. Justice Frankfurter said in his dissenting opinion, the Court had to consider the regulatory scheme of liability in order to decide the precise question in the *Porter* case. A careful examination of the decision in that case discloses no difference between that and the instant case except the direction of the movement. The basic problem here is not liability, as this Court said, but to determine whether Congress intended that a shipment such as in the instant case should be covered by the Act. We respectfully submit that Congress did not so intend and that the *Porter* case unequivocably holds that it did not.

Although plaintiff cannot recover under his petition unless he proves delivery to respondent in good condition, it is no answer to the jurisdictional question of whether the complaint states a claim under the Carmack Amendment.

3. The origin of the shipment.

The majority opinion says that the test is not where the shipment originated but where the obligation of the receiving carrier originated. We feel certain that the Court cannot mean what these words import in their usual connotation. The act specifically says that the test of its applicability is the origin as well as the destination of the shipment. There is a marked distinction, however, between the origin of the shipment and the origin of the

obligation of the receiving carrier. For, suppose, as in the *Russo* case, a rail carrier had issued a bill of lading calling for a through shipment from Buenos Aires by water to New Orleans, and thence by rail to Boston. There the obligation of the carrier would have originated in a non-adjacent foreign country. Conversely, if a carrier issued a through bill of lading for carriage of a shipment from a point in the United States by rail to a seaport and thence by water to a non-adjacent foreign country, the obligation of the carrier as a receiving carrier would have originated within the United States, yet in neither case could the Carmack Amendment be held applicable under its own terminology. Actually, the Circuit Court so held in the case of an import in the *Russo* case, and Your Honors so held in the *Porter* case involving an export shipment.

As authority for its holding, this Court cites two Idaho cases[1] and one from an inferior Court in Georgia,[2] all decided over thirty-five years ago, and never followed since. As we pointed out in our original brief, these three cases not only are distinguishable from the instant case, but represent a decidedly minority view. To the contrary and supporting our position, is the decision in the *Porter* case, and that of the Supreme Courts of Illinois,[3] Kansas,[4] Missouri[5] and Maryland.[6]

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[1] Rice v. Oregon Short Line R. Co., 33 Idaho 565, 198 Pac. 161; Barrett v. Northern Pac. Ry. Co., 29 Idaho 139, 157 Pac. 1016.
[2] Baltimore & O. R. Co v. Montgomery & Co., 19 Ga. App. 29, 90 S. E. 740.
[3] Lino, et al. v. The Northwestern Pac. R. R. Co., 332 Ill. 93, 163 N. E. 316.
[4] Barber v. Missouri Pacific R. Company, 118 Kans. 651, 236 P. 859.
[5] Lesser-Goldman Cotton Co. v. Missouri Pac. R. Co., 321 Mo. 714, 12 S. W. 2d 485, cert. den. 279 U. S. 855, 49 S. Ct. 351, 73 L. Ed. 997.
[6] Fahey, et al. v. Baltimore & Ohio Railroad Company, 139 Md. 161, 114 A. 905.

We respectfully submit that the effect of the majority holding in this case is to overrule the *Porter*,[7] *Lino*,[8] *Barber*,[9] *Lesser-Goldman*[10] and *Fahey*[11] cases, which have stood unquestioned for years and in so doing has changed the existing concept, which had the obvious approval of Congress.

This Court, then, has overruled established jurisprudence and embarked on a new course for which even plaintiff's studious efforts could find no supporting authority.

Because the Carmack Amendment was a radical departure from the common law, and imposed a serious burden on the carriers, neither Congress nor the courts have heretofore extended the burden to cover a case such as the instant one.

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[7] 273 U. S. 341, 47 S. Ct. 383, 71 L. Ed. 672.
[8] Supra, n. 1.
[9] Supra, n. 2.
[10] Supra, n. 3.
[11] Supra, n. 4.

CONCLUSION.

We respectfully submit that to maintain the majority opinion of this Court as the law of the land would impose a burden on carriers never intended by Congress, as this Court and the other appellate courts called upon to consider the question heretofore, have recognized. We therefore respectfully urge this Court to grant a rehearing herein.

Respectfully submitted,

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New Orleans, Louisiana, March 22, 1950.

I, M. Truman Woodward, Jr., Attorney for Respondent, do hereby certify that the above and foregoing petition is presented in good faith and not for delay.

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